

GOVERNMENT PROPOSED JURY INST. NO. 268**Bank Deposits (Plus Cash Expenditures) Method 1**

To prove the alleged understatements of taxable income, the government relies upon the bank deposits [*plus cash expenditures*] method of proof. **2**

To use this method of proof, the government must establish that the defendant was engaged in an income-producing activity during the tax years in issue and that, during the course of such activity, regular and periodic deposits having the inherent appearance of current income were made into bank accounts in the defendant's name or under his [her] dominion and control.

Deposits into such accounts are totalled. Non-income transactions, such as transfers between bank accounts, redeposits, and deposits of nontaxable amounts, such as loans, gifts, inheritances, or prior accumulations, are subtracted from the total deposits. [*To this total is added any additional undeposited income that the defendant received during the tax year in issue, and any cash or currency expenditures made with undeposited funds not derived from a nontaxable source.*] **3**

The appropriate deductions, exclusions, exemptions, and credits to which the defendant is entitled then are subtracted, leaving an amount the government contends to be the corrected taxable income for the tax year in issue. This amount is then used to compute the corrected tax due and owing for the year, which is then compared with the actual tax paid in order to establish the alleged understatement of taxes.

If you find that such bank deposits [*plus undeposited income and cash expenditures*] **3** establishes a taxable income figure for each tax return in issue, which exceeds the taxable income reported on the tax returns for the years involved, you will proceed to inquire whether the government has established that those excess deposits [*and other funds received or spent but not deposited*] **3** represent additional taxable income on which the defendant willfully attempted to evade or defeat the tax. In this connection, if the government has established that the defendant was engaged in an income-producing business or activity, that he [she] was making regular and periodic

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deposits of money to bank accounts in his [her] name or under his control, that the deposits and other funds received and available for deposit have the appearance of income, then you may, but are not required to, draw the inference that these deposits [*and other funds available for deposit*] represented income during the year in question.

Explanations or "leads" may be offered to the government by or on behalf of the defendant as to the source of the funds used or available for deposits during the prosecution years, such as cash-on-hand, **1** gifts, loans, or inheritances. If such leads are relevant, reasonably plausible, and are reasonably susceptible of being checked, then the government must investigate into the truth of the explanations. Additionally, leads must be furnished well in advance of trial for the government to be obligated to investigate them or to include them in the government's computations. However, if no such leads are provided, the government is not required to negate every conceivable source of nontaxable funds.

The government claims that it has correctly taken into account all of the factors which I have mentioned and that the bank deposits plus undeposited income and cash expenditures results in a figure which fairly approximates the defendant's true individual taxable income for the calendar years 19_ and 19_.

This instruction is based on the rationale, and not the actual language, of the opinions below:

United States v. Morse, 491 F.2d 149, 151 (1st Cir. 1974)

United States v. Slutsky, 487 F.2d 832, 840 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974)

United States v. Nunan, 236 F.2d 576, 587 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957)

United States v. Venuto, 182 F.2d 519, 521 (3d Cir. 1950)

Morrison v. United States, 270 F.2d 1, 2 (4th Cir.), *cert. denied*, 361 U.S. 894 (1959)

Skinnett v. United States, 173 F.2d 129 (4th Cir. 1949)

United States v. Conaway, 11 F.3d 40, 43-44 (5th Cir. 1993)

United States v. Tafoya, 757 F.2d 1522, 1528 (5th Cir. 1985)

United States v. Normile, 587 F.2d 784, 785 (5th Cir. 1979)

United States v. Boulet, 577 F.2d 1165, 1167 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)

United States v. Horton, 526 F.2d 884, 887 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976)

United States v. Parks, 489 F.2d 89, 90 (5th Cir. 1974)

United States v. Moody, 339 F.2d 161, 162 (6th Cir. 1964), *cert. denied*, 386 U.S. 1003 (1967)

United States v. Ludwig, 897 F.2d 875, 878-882 (7th Cir. 1990)

United States v. Esser, 520 F.2d 213, 216 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976)

United States v. Stein, 437 F.2d 775, 779 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971)

United States v. Lacob, 416 F.2d 756, 759 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970)

United States v. Mansfield, 381 F.2d 961, 965 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967)

United States v. Abodeely, 801 F.2d 1020, 1024-1025 (8th Cir. 1986)

United States v. Vannelli, 595 F.2d 402, 404 (8th Cir. 1979)

United States v. Stone, 770 F.2d 842, 844 (9th Cir. 1985)

United States v. Soulard, 730 F.2d 1292, 1296 (9th Cir. 1984)

United States v. Hall, 650 F.2d 994, 999 (9th Cir. 1981)

United States v. Helina, 549 F.2d 713, 720 (9th Cir. 1977)

Percifield v. United States, 241 F.2d 225, 229 & n.7 (9th Cir. 1957)

United States v. Bray, 546 F.2d 851, 853 (10th Cir. 1976).

NOTES

1 CAUTION: The above instruction does not include an instruction on cash on hand. In those instances where the bank deposits computation includes cash expenditures or currency deposits the cases indicate that the government must establish a beginning cash on hand figure. *See* Section 33.08, *supra*, CASH ON HAND. In such a case, the above instruction should be supplemented with a cash on hand instruction. For an example of a cash on hand instruction, *see Pattern Jury Instructions, Criminal Cases*, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.3, para. 3, p. 234, reproduced *infra*.

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2 The material in brackets applies to cases which include cash or currency expenditures.

3 The material in brackets applies to cases which include both cash or currency expenditures and undeposited income. Where either, but not both, are included in a case, the bracketed language should be modified accordingly.

GOVERNMENT PROPOSED JURY INST. NO. 272**Bank Deposits Method**

In this case the government relies upon the so-called "bank deposits method" of proving unreported income.

This method of proof proceeds on the theory that if a taxpayer is engaged in an income producing business or occupation and periodically deposits money in bank accounts in his name or under his control, an inference arises that such bank deposits represent taxable income unless it appears that the deposits represented redeposits or transfers of funds between accounts, or that the deposits came from nontaxable sources such as gifts, inheritances or loans. This theory also contemplates that any expenditures by the defendant of cash or currency from funds not deposited in any bank and not derived from a nontaxable source, similarly raises an inference that such cash or currency represents taxable income.

Because the "bank deposits method" of proving unreported income involves a review of the defendant's deposits and cash expenditures which came from taxable sources, the government must establish an accurate cash-on-hand figure for the beginning of the tax year. The proof need not show the exact amount of the cash-on-hand so long as it is established that the government's claimed cash-on-hand figure is reasonably accurate. So, if you should decide that the evidence does not establish with reasonable certainty what the defendant's cash-on-hand was at the beginning of the year, you should find the defendant not guilty.

In determining whether or not the claimed cash-on-hand of the defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether government agents sufficiently investigated all reasonable "leads" suggested to them by the defendant, or which otherwise surfaced during the investigation concerning the existence of other funds at that time. If you should find that the government's investigation has either failed to reasonably pursue, or to refute, plausible explanations which were advanced by the defendant, or which otherwise arose during the

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investigation, concerning the defendant's cash-on-hand at the beginning of the year, then you should find the defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the defendant, or to reasonable leads which otherwise turn up; the government is not required to investigate every conceivable source of nontaxable funds.

If you decide that the evidence in the case establishes beyond a reasonable doubt that the defendant's bank deposits together with his non-deductible cash expenditures during the year did substantially exceed the amount of income reported on the defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional deposits and expenditures represented taxable income (that is, income from taxable sources) on which the defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.3, p. 234

GOVERNMENT PROPOSED JURY INST. NO. 274**The "Bank Deposits Method" of Determining Income - Explained**

To establish a substantial understatement of the tax on the income tax return of defendant _____ for the year[s] _____, the government has relied upon proof by the so-called "bank deposits method" of determining income during a particular period. This "bank deposits method", if done correctly, is an indirect or circumstantial way to reliably determine income.

The theory of this method of proof is that if a taxpayer is engaged in an activity that produces income and if that taxpayer periodically deposits money in bank accounts under the taxpayer's name, or under the taxpayer's control, it may be inferred, unless otherwise explained, that these bank deposits represent taxable income. If there are expenditures of cash by the taxpayer from funds not deposited in any bank and not from any non-taxable source, such as by gift or from inheritance, it may be inferred, unless otherwise explained, that this cash represents unreported income.

In this method of proof, a taxpayer's bank deposits for the tax year are totaled, with adjustments made for funds in transit at the beginning and again at the end of that year. Any "non-income" deposits are excluded from this total and income which has not been deposited is included in the total. This procedure produces a gross income figure.

Income tax is then calculated in the usual way with legitimate credits and legitimate deductions taken into account. If the resulting figure is greater than that which the taxpayer reported on his [her] tax return for that year, then that taxpayer has unreported income in that amount.

Because the "bank deposits method" of determining income involves a review of bank deposits and cash expenditures during a taxable year, the government must establish with a

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reasonable degree of certainty an accurate "cash on hand" figure for the beginning of the tax year in question. The government is not required to prove an exact "cash on hand" figure, but must prove a figure that is reasonably accurate.

If, therefore, you do not find that the government has established to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year 19__, then you should find the defendant not guilty.

If on the other hand, you find that the government has proven to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year 19__, you must then proceed to decide whether the evidence in the case establishes beyond a reasonable doubt that the bank deposits and non-deductible cash expenditures of the defendant _____substantially exceeded the amount reported on his [her] tax return for that year. If so, you should then proceed to decide whether or not the government has proven, beyond a reasonable doubt, that the defendant willfully attempted to evade or defeat the additional tax as charged in Count __ of the indictment.

Devitt, Blackmar, & O'Malley, *Federal Jury Practice and Instructions - Criminal* (4th Ed. 1990), § 56.07, pp. 1002-1004.